## REMARKS OF FCC COMMISSIONER AJIT PAI BEFORE THE HERITAGE FOUNDATION

## THE FCC AND INTERNET REGULATION: A FIRST-YEAR REPORT CARD

## **FEBRUARY 26, 2016**

One year ago today, the FCC decided to join 20th century regulation and the 21st century Internet together in not-so-holy matrimony. It's fitting that the traditional one-year anniversary gift is paper—for that's pretty much all that utility-style regulation has produced over the last 12 months. Reams of paper have been spent on litigation. Mountains more have been built counseling ISPs on the new requirements. And there are even stacks and stacks of paper that have been filed responding to the agency's Paperwork Reduction Act analysis. All this has been a gift to the legal profession. But for most Americans, the marriage has been a dud.

Last February, I said that the FCC's Title II decision was a 313-page solution that wouldn't work to a problem that didn't exist. I predicted that applying Title II to the Internet would decrease investment and slow down broadband deployment. I warned that the FCC's intrusive regulations would signal an end to permissionless innovation. And I maintained that Title II would inject tremendous uncertainty into the broadband market. One year later, all of this has come to pass.

Now, to be fair, these were not difficult calls. To paraphrase the late Justice Scalia, this wolf was not clad in sheep's clothing. No, this wolf came as a wolf.<sup>2</sup>

And to be clear, none of this was necessary. For 20 years, America stood at the forefront of the digital economy. The Internet was born here. Its development over the past two decades has proven that it is the greatest free-market innovation in history.

This was no accident. The Clinton Administration and a Republican Congress consciously decided to take a hands-off approach to the Internet—to preserve the "vibrant and competitive free market . . . unfettered by Federal or State regulation." And until 2015, every FCC Chairman, Republican and Democrat, let the Internet grow free from utility-style regulation. The result was an American digital economy that was the envy of the world.

But one year ago, the FCC abandoned the policies that had given us a free, open, and vibrant Internet. It reclassified Internet service providers as public utilities and claimed broad power over the broadband world in a narrow, party-line vote.

The decision was the product of a highly unusual rulemaking process. Left to its own devices, the FCC never would have married utility-style regulation to the Internet. But unfortunately, the FCC was dragged to the altar kicking and screaming by the White House. President Obama issued the

<sup>&</sup>lt;sup>1</sup> Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5921 (2015) (*Title II Order*) (Dissenting Statement of Commissioner Ajit Pai).

<sup>&</sup>lt;sup>2</sup> Cf. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.").

<sup>&</sup>lt;sup>3</sup> Communications Act of 1934 § 230(b)(2); *see also* Telecommunications Act of 1996 preamble (purposes of Act "to promote competition and reduce regulation").

wedding announcement on YouTube. <sup>4</sup> *The Wall Street Journal* reported that the plan was hatched through "an unusual, secretive effort inside the White House" that functioned as a "parallel version of the FCC." And Washington insiders bragged to their supporters that they got "the President to step in" to "stop FCC Chairman Tom Wheeler from moving ahead with his sham proposal to gut net neutrality."

No, the *Title II Order* was not the product of an expert agency looking at the facts and making an independent judgment. It was the product of raw political power.

So what were the results? Unfortunately, for those of us who cherished the free and open Internet, nothing we didn't predict.

1. We knew that President Obama's plan to regulate the Internet would harm investment and slow down broadband deployment.

And one year later, we are already seeing those results.

As predicted, the FCC's decision is having a disproportionate impact on our nation's smallest ISPs. Many of them have reduced investment in the communities they serve because of the FCC's decision to treat the Internet like a 19th century railroad or 20th century water company. One of them, called Aristotle, told Congress last month: "Before the [*Title II Order*] was adopted, it was our intention to triple our customer base" and "cover a three-county area. However, we have pulled back on those plans, scaling back our deployment to three, smaller communities that abut our existing network." Another, KWISP (a wireless ISP), delayed network upgrades that would have increased speeds from 3 Mbps to 20 Mbps for its 475 rural customers in northern Illinois. And Wisper ISP, which serves 8,000 customers around St. Louis, shelved plans to triple the number of new base stations it would deploy each month to provide broadband to new customers. I've heard similar stories from other small businesses over and over again. Remember, these are the companies many Americans rely on, or would like to, for competitive alternatives.

At larger ISPs, growth in broadband investment has also flatlined. That's only happened twice before on a year-over-year basis: following the dot com bust in 2001 and after the Great Recession in 2008. Indeed, economist Hal Singer has shown that the Obama Administration has now overseen the first-ever reduction in year-over-year investment by major ISPs that happened outside a recession, one which "[j]ust happens to coincide with the Title II era."

In my dissent, I warned that "[b]roadband networks don't have to be built. Capital doesn't have to be invested here." Unfortunately, I was right. One broadband provider decided that buying AOL for \$4.4 billion made more sense than increasing fiber deployment. Another poured billions of dollars south

<sup>10</sup> Title II Order, 30 FCC Rcd at 5927 (Dissenting Statement of Commissioner Ajit Pai).

<sup>&</sup>lt;sup>4</sup> The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

<sup>&</sup>lt;sup>5</sup> Gautham Nagesh & Brody Mullins, Net Neutrality: How White House Thwarted FCC Chief, *Wall Street Journal*, (Feb. 4, 2015).

<sup>&</sup>lt;sup>6</sup> Kerry Picket, Obama's Move to Regulate Internet Has Activists' "Fingerprints All Over It," *The Daily Caller*, (Feb. 23, 2015), *available at* http://bit.ly/1zg6pFj.

<sup>&</sup>lt;sup>7</sup> Written Testimony of L. Elizabeth Bowles, Legislative Committee Chair, Wireless Internet Service Providers Association and President, Aristotle, Inc. before the House Energy & Commerce Committee Subcommittee on Communications and Technology at 3 (Jan. 12, 2016), *available at* http://go.usa.gov/cEbP3.

<sup>&</sup>lt;sup>8</sup> See Statement of Commissioner Ajit Pai on New Evidence that President Obama's Plan to Regulate the Internet Harms Small Businesses and Rural Broadband Deployment (May 7, 2015), available at http://go.usa.gov/cEbnh.

<sup>&</sup>lt;sup>9</sup> Hal Singer, @halsinger, http://bit.ly/21nVxGd (Feb. 20, 2016).

Hal Singer, @naisinger, http://bit.ly/21nvxGd (Feb. 20, 2016).

of the border, in Mexico, while reducing investment here at home. Still other American companies are getting out of the business entirely, selling off their assets to foreign investors. And the latest hot investment for an ISP? Yahoo's search and email properties. That might be good news for Silicon Valley, but it doesn't deliver better, faster, cheaper broadband for the millions of Americans who want it.

2. We knew that President Obama's plan would give the FCC the power to micromanage virtually every aspect of how the Internet works.

One year ago, I warned that the agency's Internet conduct standard would give the FCC "a roving mandate to review business models and upend pricing plans that benefit consumers." It was a marked shift away from the era of permissionless innovation.

And sure enough, the FCC is now hauling companies into our headquarters to justify their service plans. Take T-Mobile's Binge On program, which lets customers choose to stream videos without it counting against their data usage. In November, agency leadership called the program "highly competitive and highly innovative." Just one month later, after pressure was applied by many of the same special-interest groups that demanded utility-style regulation in the first place, the FCC flip-flopped. It opened an investigation into whether Binge On violated the new Internet conduct standard. And now, net neutrality proponents claim that letting consumers watch online video for free is "discriminatory," "limits user choice," and "stifles free expression." Some even argue that such a practice, known as zero-rating, is a human rights violation!

T-Mobile isn't the only company under the microscope. At least three other companies have received similar treatment. This episode has made clear that nobody can be certain that they're complying with the rules if and when the political winds change direction. Of course, this shouldn't come as a surprise. After all, when asked one year ago what the Internet conduct standard meant, FCC leadership admitted that "we don't know where things go next." Credit where it's due: That prediction also has proven to be true.

3. We knew that President Obama's plan would create massive uncertainty.

And it did.

Just take the FCC's ill-fated forays into the world of privacy. One year ago, the FCC proclaimed that Commission regulation of online privacy practices was necessary. But it didn't impose existing rules on Internet service providers. And for good reason: Those rules address issues unique to voice telephone service.

The only guidance the agency has offered thus far came in the form of a May 20 enforcement advisory: Companies must "employ effective privacy protections in line with their privacy policies and core tenets of basic privacy protections." To its credit, this language has led to something very rare in Washington these days—bipartisan consensus. Republicans and Democrats alike have expressed concern about this incredibly vague standard. Indeed, I agree entirely with my Democratic colleague, Commissioner Rosenworcel, who told Congress last year that this guidance is just "insufficient." <sup>14</sup>

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<sup>&</sup>lt;sup>11</sup> *Id.* at 5923.

<sup>&</sup>lt;sup>12</sup> Barbara van Schewick, T-Mobile's Binge On Violates Key Net Neutrality Principles at 2 (Jan. 29, 2016).

<sup>&</sup>lt;sup>13</sup> FCC Enforcement Advisory 2015-03, Enforcement Bureau Guidance: Broadband Providers Should Take Reasonable, Good Faith Steps to Protect Consumer Privacy (May 20, 2015).

<sup>&</sup>lt;sup>14</sup> Hearing before the U.S. House of Representatives Subcommittee on Communications and Technology, "Oversight of the Federal Communications Commission," Preliminary Transcript at 92 (Nov. 17, 2015).

This lack of direction isn't surprising. As my colleague Commissioner O'Rielly put it, "the Commission's understanding of the [privacy] issue is lacking and its expertise is low."<sup>15</sup> Indeed, the FCC isn't even the expert agency when it comes to privacy issues; the Federal Trade Commission is. The FTC has a long and robust history of enforcing consumer privacy protections. Yet the *Title II Order* has stripped the FTC of its ability to do its job with respect to ISPs. That's because the law prevents the FTC from regulating common carriers—which the FCC has said ISPs now are. So the FCC will have to fill the gap. Yet even though the agency has agreed that "there should be a uniform expectation of privacy" across the online ecosystem, for ISPs and edge providers alike, <sup>16</sup> it seems reluctant to create that expectation—to adopt the same privacy protections for ISPs that the FTC has long applied to edge providers.

In theory, an online privacy rulemaking is coming. It's been promised—repeatedly. First, it was coming "in the fall." Once fall came, it was expected "in the coming months." And then it was due by the end of "football season." With the Super Bowl behind us, one wonders if Opening Day of baseball season will be the next target. Until then, ISPs and their customers must simply guess what the rules may

Or how about the FCC's "enhanced disclosure" obligation? The *Title II Order* required large ISPs to produce detailed information about network performance and network management. But it temporarily exempted smaller providers, finding that the evidence suggested compliance would be "particularly burdensome." One year later, we *still* don't know whether small ISPs will be subject to the requirement.

When the FCC's staff later sought comment on whether the small business exemption should be permanent, 18 the responses were *unanimous*: The enhanced disclosures create a significant burden for small ISPs with little if any benefit to consumers. 19 As the Obama Administration's Small Business Administration put it: "[C]ompliance with the enhanced transparency requirements . . . is not feasible for small broadband providers, particularly small rural providers, and may ultimately degrade the quality of service that consumers receive."<sup>20</sup> Or, as U.S. House of Representatives Energy and Commerce Committee Chairman Fred Upton, Small Business Committee Chairman Steve Chabot, and 33 other Representatives wrote, the "requirements jeopardize the ability of small [ISPs] to offer broadband services to our constituents, and to deploy faster and more sophisticated broadband networks."<sup>21</sup>

Will the FCC require small ISPs to comply with these burdensome regulations? Nobody knows. The agency punted the issue last December for a year, in part because the burdens are so large that review by the Office of Management and Budget has stalled. And so wireless ISPs, rural cable operators, and

<sup>&</sup>lt;sup>15</sup> *Id.* at 93.

<sup>&</sup>lt;sup>16</sup> *Id.* at 141.

<sup>&</sup>lt;sup>17</sup> Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5677, para. 172 (2015) (Title II Order).

<sup>&</sup>lt;sup>18</sup> Consumer and Governmental Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements, GN Docket No. 14-28, 30 FCC Rcd 6409 (Consumer & Gov't Affairs Bur. 2015).

<sup>&</sup>lt;sup>19</sup> See, e.g., WISPA Reply at 6 (Sept. 9, 2015) ("By its terms, this [one] 'enhancement' requires providers to gaze into a crystal ball and predict how a particular network management practice will affect each subscriber at a particular time and location, a level of detail that may be extremely burdensome to divine and impossible to state in specific terms.").

<sup>&</sup>lt;sup>20</sup> Small Business Administration Office of Advocacy Reply at 2 (Sept. 8, 2015).

<sup>&</sup>lt;sup>21</sup> Letter from Fred Upton, Chairman, Committee on Energy and Commerce, et al., to Tom Wheeler, Chairman, FCC, at 1 (Nov. 19, 2015).

mom-and-pop telephone companies are left to wonder whether they should continue to invest in their networks or instead prepare for a flood of new federal paperwork.

Yet another area of uncertainty is the FCC's imposition of broadband taxes. Every American with a phone bill pays a "universal service fee"—that is, a tax on voice service. That tax is collected by every telecommunications carrier, and the money ultimately is spent by the government on things like the so-called E-Rate and Lifeline programs. By reclassifying ISPs as "telecommunications carriers" last year, the FCC explicitly opened the door to the imposition of a universal service tax on Internet access.

At the time, the FCC observed that it had already asked the Federal-State Joint Board on Universal Service to report by April 2015 whether and how the Commission should impose a broadband tax. And it noted that a "short extension" might be needed in light of reclassification.<sup>22</sup>

One long year later, we *still* have no clarity. To be sure, we *do* know that the federal government and others are eager to dip further into consumers' wallets. For the FCC has already decided to boost E-Rate spending by \$1.5 billion per year (conveniently, right after the November 2014 elections). And it will soon dramatically expand the Lifeline program to subsidize broadband.

As I said one year ago, read my lips: The money to fund this spending spree will come from a broadband tax. The only question is when. Thus far, all we've been told is that no decision on broadband taxes will be made until after the D.C. Circuit decides whether the FCC's regulations are legal. But given that the FCC generally refused to delay enforcing these regulations until after the legal challenge was resolved, one might reasonably suspect that this decision is conveniently being put off until after the November elections. After all, making people pay more to access the Internet isn't going to be popular.

The American people should not let the FCC sweep this massive tax increase under the rug. They deserve to know how much more they are going to have to pay to go online. The FCC should not impose a broadband tax in the stealthy darkness of the next Washington winter.

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Unfortunately, the FCC's Title II decision fits in to a much broader story about broadband in America. When you look back at the last seven years, one thing is clear: This Administration's policies have failed.

Neither Title II nor any other Administration policy has spurred broadband adoption, as advocates claimed. Instead, this Administration has overseen the first-ever decline in home broadband adoption since the advent of the commercial Internet. According to the Pew Research Center, "home broadband adoption seems to have plateaued," with more than 9.6 million Americans having given up home broadband connections between 2013 and 2015. That means over the last six years, only 4% of Americans have decided to adopt broadband at home. Compare that with the 57% of Americans that signed up for broadband during the last Administration. <sup>24</sup>

I doubt anyone here at the Heritage Foundation is surprised by this data. After all, Heritage's annual Index of Economic Freedom shows that the United States was the sixth freest in the world when President Obama took office. Now it's dropped out of the top ten with a score that "equaled its worst score ever." As the Index puts it, "Americans continue to lose economic freedom, . . . and the

<sup>&</sup>lt;sup>22</sup> Title II Order, 30 FCC at 5836 n.1471.

<sup>&</sup>lt;sup>23</sup> John B. Horrigan & Maeve Duggan, Pew Research Center, Home Broadband 2015 at 2 (Dec. 21, 2015), *available at* http://pewrsr.ch/1PbbJC9.

<sup>&</sup>lt;sup>24</sup> *Id.* at 3.

<sup>&</sup>lt;sup>25</sup> Heritage Foundation, 2016 Index of Economic Freedom: United States, http://www.heritage.org/index/country/unitedstates (2016).

regulatory burden is increasingly costly."<sup>26</sup> Nowhere is that more true than in the dynamic broadband marketplace.

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So where do we go from here? To start, President Obama's plan to regulate the Internet may not last for long. The D.C. Circuit is weighing arguments that the FCC exceeded its jurisdiction; failed to justify its case with substantial evidence; never gave the public the notice-and-comment opportunity required by the Administrative Procedure Act; breached the First Amendment; and violated the statute by reclassifying mobile broadband Internet service. Those are five meaty arguments, and proponents of Internet freedom need to win just one of them.

And the courts are not the only avenue for overturning reclassification. The House and Senate could deny funding to implement the *Title II Order* or strike it from the books. Just yesterday, Senators Mike Lee, John Cornyn, Tom Cotton, Ted Cruz, Rand Paul, Marco Rubio, Ben Sasse, and Tom Tillis introduced a bill that would repeal President Obama's plan entirely. And, of course, a future FCC could return us to the bipartisan consensus that the Internet is best left unfettered by invasive regulation.

So I am optimistic. Proponents of Internet freedom have opportunity after opportunity after opportunity to strike down President Obama's plan to regulate the Internet. In contrast, regulatory activists must win every battle to stay the course. I like those odds.

In the meantime, I submit that what our country needs—what Americans deserve—is not an agency that sways with the political winds, but a real broadband deployment agenda. We need a proactive, concrete, bipartisan, dedicated effort to deliver digital opportunity to every American who wants it.

That means embracing the IP Transition and letting carriers sunset the increasingly obsolete public switched telephone network in favor of next-generation technologies like fiber.

That means creating a roadmap for state and local governments so that every company that wants to deploy fiber doesn't have to cut through regulatory thickets every single time in every single location.

That means reducing the red tape for deploying wireless infrastructure on federal lands, where approval currently takes twice as long as on private lands.

And that means reopening the spectrum pipeline to get more of the airwaves out of the federal government's hands and into the commercial marketplace.

In short, that means promoting competition. That means getting rid of outdated rules and regulatory uncertainty. And that means giving everyone—large companies and small, entrepreneurs and consumers—the confidence that the government will no longer stand as the gatekeeper when it comes to broadband and the services and applications that depend on it.

On the one-year anniversary of the *Title II Order*, it's time to recognize that President Obama's plan to regulate the Internet is, was, and will continue to be a wasteful distraction—that the Internet and heavy-handed regulation were not a marriage made in heaven. It's time to separate the two and finally bring the bounty of broadband to all Americans who want it. It's time to "reduce talk to practical results," as the National Broadband Plan put it half a decade ago.<sup>27</sup> It's time for a new beginning.

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<sup>&</sup>lt;sup>26</sup> *Id*.

<sup>&</sup>lt;sup>27</sup> National Broadband Plan at 338.